IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 309

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, *et al.*,

Petitioners,

vs.

JOSEPH CARROLL, *et al.*,

Respondents.

No. 310

JOSEPH CARROLL, *et al.*,

Petitioners.

vs.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CROSS-PETITIONERS' (PLAINTIFFS') PETITION FOR REHEARING

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of the undersigned petitioners, Ben Cutler, Joseph Carroll, Marty Levitt and Charles Peterson, respectfully shows:

I. Petitioners were plaintiffs below and cross-petitioners in No. 310 October Term, 1967.

II. We petition for rehearing because the decisions dated May 20, 1968 in No. 309 and No. 310 October Term, 1967, are seriously erroneous on a number of crucial facts which are uncontradicted in the record; and because said decisions, especially the majority decision, demonstrate that this Court was grievously misled by the Union briefs and by the opinions of the courts below.

III. (1) Both the majority and minority opinions, apparently misled by Judge Friendly's dissent below, affirm and assume that, in the music industry,

(a) petitioners as leader-employers charge prices which represent "almost entirely the scale wages of sidemen", the leader's fee and the 8% surcharge; and

(b) the Union-established minimum prices represent "almost entirely" the wages of sidemen, the leader's fee and the 8% surcharge.

Nothing in the record warrants these grossly erroneous assumptions.

Here, for example, is a break-down of the minimum price, fixed by Local 802, for any leader-employer (like plaintiffs below) who books an engagement in Chicago, Illinois, to be performed by five musicians (including the leader) for a Wednesday Debutante party (10:00 p.m. to 3:00 a.m.), continuous music—all computed at Union price and wages:

1) Wages of 4 employee musicians (4 x $71)	$ 284.00
2) Leader's fee (2 x $71)	142.00
3) Mileage fee for employees (4 x $67)	268.00
4) Mileage fee for leader	67.00
5) Airplane tickets (5 x $92.00)	462.00
6) Cartage fee $4 plus ½ fare for bass viol	50.20
7) Food (dinner, breakfast and lunch) (5 x $9.00)	45.00

8) Lodging (5 x $10.00)		50.00
9) Uniforms (5 x $2.00)		10.00
10) Pension (for Chicago Local) $6.00		6.00
11) Taxis (5 x $5.00)		25.00
12) 10% differential for employees:		
$284 (item 1 above)		
269 (item 4 above)		
$553 (times 10%) ..		55.30
13) 10% differential for leader-employer		
$142 (item 2 above)		
67 (item 4 above)		
$209 (times 10%) ..		20.90
Total used as base for 8% surcharge ..		$1,485.50
14) 8% surcharge (8% of $1,485.50)		118.83
15) UNION MINIMUM PRICE		$1,604.33

Of the foregoing items, Nos. 2, 4, 5, 7, 8, 9, 10, 11, 13 and 14 go into the *leader-employer's* pocket, as part of the *price mandated by Union bylaws:*

2)	142.00	(leader's fee)
4)	67.00	(leader's mileage)
5)	92.40	(leader's plane fare)
7)	9.00	(food for leader)
8)	10.00	(lodging for leader)
9)	2.00	(leader's uniform)
10)	2.00	(leader's pensions)
11)	5.00	(taxi fare for leader)
12)	20.90	(10% differential for leader)
14)	118.83	(8% surcharge)
Total ..	$469.13	or slightly more than 29% of the Union minimum price.

The purely *wage* items in the foregoing computation are:

1)	(Wages of sidemen)	$284.00
3)	(Mileage for sidemen) ..	268.00
6)	(cartage)	4.00
12)	(10% wage differential)	55.20
	Total	$611.20 or 38% of the Union price

Professional leaders frequently charge more than the Union minimum wage. Only leaders like plaintiffs do traveling engagements. "Leaders" who have no regular bands and no reputations are not invited across State lines.

If the band taken to Chicago comprises *ten* men (including the leader), the Local 802 price would be $3,068.60. This includes an 8% surcharge of $227.30; wages to sidemen of about $1,400 or 46% of the Union minimum price; and Union-mandated employer income of $578 or 19% of the Union minimum price.

If Cutler plays a dinner *without dancing* at Waldorf Astoria's Grand Ballroom, he is permitted by the Union to have 6 men in his orchestra, including himself. But if the dinner is *with dancing* in that same Ballroom, the Union insists on a minimum of 12 men in the band, including leader. The Union minimum price for dinner music with six men and without dancing would be $191.70, 34% of which would be Mr. Cutler's minimum profit under Union bylaws. But the price for dinner *and dance music* (12 men) would be $477.36 *at least,* under Union bylaws; and Mr. Cutler's income out of this price is 15.5% under said bylaws. There would be no 10% travel differential, no travel expenses and no mileage fees. But the purchaser of the music (the father of the debutante) would, under Union bylaws, have to pay $285.66 *more for the dance music than for mere dinner music.* This represents a *price increase,* due to Union minimum-employment quotas, unilaterally fixed by Union officials, of more than 240%,

which the public must pay because of the impact of unilateral Union pricing policies on the market for musical services.

Had Judge Friendly made calculations like the foregoing from the Local 802 Price List-booklet, he would not have arrived at the easy assumptions by which he misled himself and this Court to the extent illustrated by the quotations set forth in footnote 1, below. Computations based on Union pricing rules would quickly show that all of the quotations in footnote 1 are seriously in error in one or

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[1] "The prices are the total of (a) the minimum wage scales for sidemen, (b) a 'leader's fee' which is double the sideman's scale when four or more musicians comprise the orchestra and (c) an additional 8% to cover social security, unemployment insurance, and other expenses."

"The premise of the majority's conclusion was that the 'Price List' was disqualified for the exemption because its concern is 'prices' and not 'wages'. But this overlooks the necessity of inquiry beyond the form."

"As such the provisions of the 'Price List' establishing those floors are indistinguishable in their effect from the collective bargaining provisions in *Teamsters Union* v. *Oliver*, 358 U. S. 283, which we held governed not prices but the mandatory bargaining subject of wages."

"The price floors here serve the identical ends served by Article XXXII in *Oliver*."

"* * * the Price List is therefore '. . . a direct and frontal attack upon a problem thought to threaten the maintenance of the basic wage structure * * *' 358 U. S., at 294."

"In other words, the price of the product—here the price for an orchestra for a club-date—represents almost entirely the scale wages of the sidemen and the leader. Unlike most industries, except for the 8% charge, there are no other costs contributing to the price. Therefore, if leaders cut prices, inevitably wages must be cut."

"* * * Similarly, the price-list requirement is brought within the labor exemption under the finding that the requirement is necessary to assure that scale wages will be paid to the sidemen and the leader."

"In this respect we agree with the view espoused by Judge Friendly in his dissent, 372 F. 2d, at 168-170.

We think also that the caterer and booking agent restrictions 'are at least as intimately bound up with the subject of wages,' *Oliver II*, *supra*, at 606, as the price floors."

more respects; and that, if this Court needed accurate fact statements as the point of departure for its legal conclusions, it did not have them. This Court's own inquiry never went beyond *form* to reach the substance and specificities of the Union pricing methods spelled out in the Local 802 "Price Lists".

(2) Petitioners (plaintiffs below) are professional, full-time leaders, who (as the Union attorney admitted on the oral argument) are *employers* and who never play as sidemen. They have established businesses with their own established clienteles and reputations. They do not "*assume*" (as the majority suggests) the role of "leader of the orchestra," as an actor assumes a role. They *live* their careers as leader-*employers*. They do not obtain sidemen after assuming the role of leader. They have teams of regular musician-employees and other groups of extra-musician-employees. In this respect, they operate exactly like employer-caterers and employer-restaurateurs, who have regular and extra employees, depending on need. Moreover, the number of employer-leaders, like plaintiffs, is small; but their small group performs more than half the engagements for which contracts are filed with the Union.[2] Had these simple facts been kept in mind—facts which are undisputed on the record—the majority would

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[2] Judge Friendly refers to Defendant's Exhibit L which shows that 6,589 of Local 802's 30,000 members acted as "leaders for club dates" during the period from April 31 to December 31, 1960. This Union exhibit demonstrates that 1.7% of all "leaders" (plaintiffs are in this group of 1.7 percent) have garnered 36.6% of all engagement contracts filed with Local 802; and that 4.9% of all of the leaders involved had garnered 52.4% of all such engagement contracts. Judge Friendly thought these figures do not show that professional leaders stand apart from the others. The feature that really makes them *stand apart* is not statistics but their *status* as *employer-businessmen*. The statistics do show, however, that a small number of professional leaders (the ones who would be called upon for travel across State lines) get more than 52 percent of all engagements.

not have been betrayed into the further serious errors listed in footnote 3 below.

Such factual errors are serious: because they agglomerate plaintiffs below with the marginal "orchestra leaders" who are primarily sidemen; of whom it can truthfully be said that they constitute a "labor group". Unlike plaintiffs, marginal leaders are largely *employee*-musicians, who occasionally *improvise* as "orchestra leaders". They are not full-time employers and businessmen as are plaintiffs.

It seems anomalous that plaintiffs and other full-time leader-employer-entrepreneurs do not constitute a *class*, but are nevertheless made to constitute a labor *group*"! It is even more anomalous that, in the rationale of the majority, plaintiffs are indiscriminately included in the vague and ambiguous designation of "leaders" or "orchestra leaders", which necessarily includes the "spectrum" of which Judge Friendly wrote—a spectrum which embraces mostly (96%) employee-musicians who *occasion-*

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[3] "The purchaser of the music, *e.g.*, the father of the bride, the chairman of the events, etc., arranges with a musician, or with a musician's booking agent, to provide an orchestra of a conductor and a given number of instrumentalists, or 'sidemen,' at a specified time and place. The musician in such cases assumes the role of 'leader' of the orchestra, obtains the 'sidemen' and attends to the bookkeeping and other details of the engagement."

"A musician performing 'club-dates' may perform in different capacities on the same day or during the same week, at times as leader and other times as subleader or sideman. The four respondents, however, are musicians who usually act as leaders and maintain offices and employ personnel to solicit engagements through advertising and personal contacts."

"* * * part of the union prescribed 'leader's fee' is attributable to service rendered in either conducting or playing and part to the service rendered in selecting musicians, bookkeeping, etc."

Footnote 1 of the dissent indicates a further factual error. Plaintiffs were not—all four of them—expelled from the Union. Peterson and Carroll were punished with expulsion. Cutler and Levitt were not.

ally assume the role of "leader", as distinguished from plaintiffs who *always* function as leader-employers. Besides, professional leaders like plaintiffs (as the undisputed evidence shows) only rarely spend time selecting musicians. This they leave to their "contractors", who are also subleaders, *i.e.*, "supervisors" within the meaning of the NLRA. Nor is the professional leader's workday, on the average, usually devoted to leading or conducting. It is for the most part spent in soliciting clients, negotiating contracts, arranging problems (Petitioner's main brief pp. 22-23; second paragraph of dissenting opinion).

(3) Some of the grossest and most critical factual errors in the majority and minority opinions suggest that plaintiffs, in particular, and professional leaders like them, in general, are likely to, or actually do, *undercut wages,* unless the Union is given the right to dictate minimum prices for the industry. *The Union presented no professional leader as a witness.* Plaintiffs brought 25 of them to the stand. Each of these testified, without contradiction, that he *always* pays the wage scale unilaterally imposed by the Union. Five booking agents, including the two largest in the United States, testified that there was no wage or price cutting by any leaders they serviced. The only witnesses who admitted wage cutting were two Union witnesses who generally performed as sidemen. (One of the two was a Union official at the time of the trial.) Two of the plaintiffs (Carroll and Peterson) have not been Union members for four years. During that time, they *always* paid Union wages, as their uncontradicted evidence shows. One plaintiff, only (Levitt), admitted undercutting the Union *price* on one steady engagement. But he stated without contradiction that he nevertheless always paid Union *wages.* Union price control in the musical industry is no more necessary than union price control in any other industry. Employee-union-members and union officials are the best enforcers of Union scales

in this and in all industries. Not a line of record evidence shows the need to protect Union wages by Union price-fixing, especially in view of the constant visitation of all performances by Union delegates.

Considerations such as these, though amply supported by uncontradicted record evidence, were completely disregarded by this Court, because it was misled as to the facts by the courts below. Petitioners were carelessly thrown, by those courts, into a heterogeneous class of "leaders", or "orchestra leaders" in general. The outstanding characteristics of that class—the *occasionalness* of service as *"employers"* by members thereof and the *usualness* of their service *as sidemen*—were inaccurately attributed to plaintiffs, who never serve as sidemen and who are always full-time, true employers. Had this indiscriminate lumping of petitioners with the vast majority of "leaders" (who are primarily *sidemen*) not occurred, errors contained in the quotations gathered in footnote 4 would not have been committed.[4]

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[4] "The 'Price List' establishes only a minimum charge; there is no attempt to set a maximum. Nor does the union attempt by its minimum charge to assure the leader a profit above the fair value of his labor services. The District Court found no evidence 'which indicates that the increment to the [leader] is unrelated to his costs in that function'. 241 F. Supp., at 841. See also 372 F. 2d, at 170 (Friendly, J., dissenting): 'A different result might be warranted if the floor were set so high as to cover not merely compensation for the additional services rendered by a leader but entrepreneurial profit as well. But there has been no such showing here.'"

"If the union may not require that the full-time leader charge the purchaser of the music an amount sufficient to compensate him for the time he spends selecting musicians and performing the other musical functions involved in leading, the full-time leader may compete with other union members who seek the same jobs through price differentiation in the product market based on differences in a labor standard.

"The union thus has a right to see that the petitioner does not perform that work for less than the going scale for union musicians and subleaders."

(Footnote continued on following page)

(4) As Justice Fortas indicated almost at the beginning of the oral arguments in these cases, the question whether *plaintiffs* are *employers* is crucial in this case. The evidence that they are employers is massive and uncontradicted in the record. It was conceded by the Union attorney during oral argument. It was found by the NLRB and by its Examiners in the following cases:

1) *Associated Musicians, Local 802* and *Charles Peterson and National Association of Orchestra Leaders,* 171 NLRB No. 149 (which finds that petitioner-plaintiff Peterson is an employer).

(Footnote continued from preceding page)

"The critical inquiry is whether the price floors in actuality operate to protect the wages of the subleader and sidemen. The District Court found that the price floors were expressly designed to and did function as a protection of sidemen's and subleaders' wage scales against the job and wage competition of the leaders."

"Thus the price floors, including the minimums for leaders, are simply a means for coping with the job and wage competition of the leaders to protect the wage scales of musicians * * *."

"That regulation is also justified as a means of preserving the scale of the sidemen and subleaders. There was evidence that when the leader does not collect from the purchaser of the music an amount sufficient to make up the total of his out-of-pocket expenses, including the sum of his wage-scale wages and the scale wages of the sidemen, he will, in fact, not pay the sidemen the prescribed scale. The District Court found:

> 'It is unquestionably true that skimping on the part of the person who sets up the engagement [the leader] so that his costs are not covered is likely to have an adverse effect on the fees paid to the participating musicians.' * * *"

It will be noted that in the quotations *supra,* the majority makes a transition from a *labor contract* which *in form* not *in substance* (in actuality) fixes *prices* (such as was encountered in the *Oliver* case) to a *union bylaw* which *in form and in actuality* here imposes upon a whole industry a universal, unilaterally imposed pricing system to protect *employers* from competition and allegedly to protect union wage scales also unilaterally imposed. Such a transition is, it is respectfully submitted, logically and jurisprudentially indefensible under the complex of labor and antitrust legislation which deserves consideration and application here. The AFM price-list booklets fix prices both in form and in undeniable actuality!

2) *Carroll* v. *AFM*, 372 F. 2d 155 (C. A. 2) (which held that petitioner-plaintiff Carroll is an employer).

3) *Associated Musicians, Local 802* and *Ben Cutler*, 164 NLRB No. 8 (which held that petitioner-plaintiff Cutler is an employer).

4) *Marty Levitt and AFM and Local 802*, 171 NLRB No. 94

See also: *Bartels* v. *Birmingham*, 332 U. S. 126; *Carroll* v. *AFM*, 294 F. 2d 484 (2nd Cir. 1961); *Carroll* v. *Associated Musicians of Greater New York*, 284 F. 2d 91 (2nd Cir. 1960); affirming 183 F. Supp. 636; *Cutler* v. *AFM*, 316 F. 2d 546, cert. denied 375 U. S. 941; *Schwartz* v. *Associated Musicians*, 340 F. 2d 222 (2nd Cir. 1963); *Cutler* v. *United States* (Court of Claims), 180 F. 2d 360.

There was no finding on this point by the Trial Court and no ruling by this Court. It would have been both anomalous and self-contradictory to place—for the first time in American jurisprudence—veritable *employers* in a "*labor* group"! This was nevertheless, done, despite plaintiffs' indisputable status as *employers*. Neither fact nor principle justifies this aberration. Under our labor laws, there is no logical justification for the transition from "labor group" to the "leader's labor service" or to "labor group work", such as the majority and dissenting opinions effected. If a person is an *employer*, or a "supervisor" as defined in the NLRA, he simply has no place in the union which has organized his employees. No amount of rationalization with judge-made concepts like "labor group" or "labor group work" or "leader's labor service" can obscure the clear, express intention of Congress to exclude *employers, supervisors and independent contractors* from unionization (here tolerated by this Court in spite of the *realities* behind the *Los Angeles Meat Drivers* case, 371 U. S. 94).

Nor is there any economic or legal justification for the analysis and partitioning of employer function undertaken, expressly or implicitly, by the opinions here. In no other industry or case were the functions of the employer split into "labor group work" and non-labor group work; or into an employer's "labor service" and his non-labor service.

That process, begun here, can have far-reaching effects. Unions and courts will now scrutinize the chores performed by *employers,* to learn whether they are quasi-employers (*i.e.,* the anomalous *employers* to be placed wholly or partially in "labor groups") or the genuine employers (to be classified outside any "labor group"). On such artificial classification now depends an overweening "union interest": to force real *employers* into unions with their own employees and supervisors, to fix minimum prices for an entire industry and to fix wage scales without collective bargaining. Until now, we would have thought that merely to mention the possible consequences of such a principle would be argument enough to condemn it. Surely such a "principle" was enunciated "without full awareness of the implications and the likely consequences"!

(5) Stripped of its gloss of rationalization, the majority opinion stands unmistakably for the following revolutionary proposition:

Unions have the right, under our antitrust laws, to fix and enforce, unilaterally, minimum prices for an entire industry, *provided* they do so to protect wage scales which they impose without collective bargaining!

If there is a more disturbing and unusual principle in the whole range of labor law or antitrust law, we cannot conceive it. It can and surely will lead to widespread, if not universal, union *price* fixing—in the utter absence of statutory warrant.

(6) Despite our labor statutes, the rule of the majority inordinately expands the concept of "union interest" in such a drastic fashion that now unions have an "interest" to force employers and supervisors into union membership in the same labor organization which has organized the employers' employees; *provided* that the chores performed by the involved employers include items which have been or can be performed by union members; or which the courts wish to denominate as employers' "labor service" or employers' "labor group work"; or which fall within "union interest". This sort of surgery, perpetrated upon the *employers'* function and performance, desecrates the integrity of the employer's function and status. With the scalpel of rationalization, it dissects the employer into two parts—the entrepreneurial part and the "labor group" part—to ascertain whether he should be placed in a "labor group" or not. Let him be discovered to have only a small ingredient of "labor group work" in his employer performance, and he is relegated to a "labor group". Union interest in *fixing prices* is thus traceable to the fact that the employer has not surrendered as much work (including his *own*) as the employer can surrender to employees who are union members. This is more judicial will than legal reason. The architect, engineer, jeweler, chemist, lawyer, orchestra leader, shopkeeper or executive who does any work resembling what is actually *or potentially* done by union members in each of the involved areas of work is now subject to forced union membership, union price fixing, etc., despite his status as *employer*. Union men want some of the work he performs!

Or else, only employers in the music industry are discriminatorily subjected to this sort of union demand, union processing and judicial dissection. A leader like plaintiffs provides jobs for union members. That is not enough. He must do this with such abandon as to *deprive himself of some of his own job*—namely, the job

of acting as a full-time employer in his industry *typically* acts. All empoyer-leaders in the industry rose to employer status by, among other things, playing an instrument and by playing it *in the unique manner required for leading.* This they must give up if they wish to avoid enforced unionization!

In the various industries, employers perform different chores. They are allowed to remain employers and outside unions in all other industries when they do what employers in their industries typically or characteristically do. But not in the music industry. Here, they suddenly lose such *employer* status, even when they act as typical leader-employers *must* and *do* act to preserve their businesses. It is more important to protect unlawfully imposed wage scales unilaterally dictated by the Union, than to protect the employer's work, which provides jobs! Congress and the NLRB say that *employer status* is the crucial difference. This Court now says there are other *differentiae,* born of a diffuse and literally unlimited criterion taken from the *dictum* in the last paragraph of the *Los Angeles Meat Drivers* case.

The fallacy and unfactuality, from the point of view of economic theory and practice, of the Court of Appeals' reasoning as quoted with approval by the majority of this Court (p. 8, Slip Opinion) becomes apparent when the principle is generalized so as to apply to all employer-businessmen:

> Where the employer-businessman performs work which an employee, who is a union member, does or could perform, the services of such employee would not be needed and the employer in this way saves wages he would otherwise have to pay. Therefore [this is the suppressed conclusion], the employer should not be allowed to perform such services and thus save wages; but should be required to hire an employee to do what leader-employers typically and always do; or the union involved should, in the al-

ternative, have the right and the "interest" to enlist or coerce said employer into union membership, to regulate his prices and regiment his business!

What has just been stated is no caricature. It accurately spells out the rule of antitrust and labor law stated by the Court of Appeals and approved by this Court in its decision of May 20, 1968. If there be any doubt upon that score, the following language from the majority opinion dispels it: "Thus the price floors, including the minimum for leaders, are simply a means for coping with the job and wage competition of the leaders to protect the wage scales of musicians who, respondents concede, are employees on club dates, namely sidemen and subleaders."

As long as unions fix price floors simply as a means "for coping with job and wage competition" (which it is now as easy to prove as to allege) with *employer*-businessmen in order to "protect the wage scales" *unilaterallly imposed by unions,* the union has the legal *right,* under the antitrust laws, to fix such price floors. This is the furthest extreme of union license under antitrust laws which this Court has ever approved. It is respectfully submitted that it is an extreme which challenges the whole jurisprudence of antitrust law legislation and aggrandizes the already over-stuffed powers of union leaders.

The quotation just made speaks of "the job and wage competition of the leaders," apparently referring once more to the *generality of "leaders",* of whom it may indeed be said that they are in job and wage competition with union members *because the generality of "leaders" are regularly and primarily sidemen.* But that reasoning has absolutely no application to petitioners who are, in every legal and factual sense, full-time leader-*employers.* In no sense approved by economic realism can it be said that *employers* are in "job and wage competition" with their employees or with sidemen in general. And subleaders, as "supervisors" within the meaning of the

NLRA, have no right to be in the same union which has organized petitioners' employees.[5] Petitioners who have invested their lives, their efforts and their savings in their businesses and in their functions and status as leader-*employers*, are shocked at this Court's discrimination against them; and more shocked at judicial subjection of *all employers* to such unlimited "union interest" on the basis of "labor group work" or "labor service". This highly synthetic and unrealistic construction submits to unionization and union price dictation *all employers;* because all employers (except possibly the lazy ones and corporate entities as such) do some routine employer work which union members can do; and which union lawyers can henceforth call "labor service" or "labor group work", in order to assert "union interest."

(7) In effect, this Court by its majority opinion has scrapped the *Allen-Bradley* rule. At the very least that rule has been embroidered with patterns of "labor group work" which confusingly blur the distinction between employer and employee (to the further distension of the power of labor union leaders). Until now that distinction has been relatively easy in labor law and antitrust law. It is now withered by "union interest", despite uncontradicted record facts and the ordinary realities of industrial and economic life.

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[5] Throughout these cases there has always been judicial failure to recognize the fact that a subleader is a *supervisor* within the meaning of the National Labor Relations Act, as amended. This is a point which Trial Examiner Boyd Leedom (formerly Board Member) did not fail to note in his recent decision (TXD-324-68 N. Y., N. Y., dated May 29, 1968 in cases no. 2-CB-4489-1, 2 CB 4494, 2 CB-4489-2, 2 CB-4489-3, 2 CB-4495, 2-CA-11264, 2-CA-11265). On page 4 of his decision, Mr. Leedom wrote: "Eddie Cardelli [petitioner] Carroll's contractor, that is, his hiring agent and supervisor within the meaning of the Act, as I find and conclude, had employed, in behalf of Carroll, musicians Frank Miller, Lawrence Arthur and Herbert Bass to play in one of Carroll's musical organizations organized weeks in advance for an engagement at the Waldorf Astoria Hotel in New York City on March 6, 1967."

(8) Some of the more important facts which emerge, uncontradicted, from the record concern the union *combination* with *non-labor groups* in these cases. Yet they are facts which this Court apparently overlooked, because it was misled by Judge Friendly's dissent and by the Union briefs. AFM and its Locals sign "labor contracts", for example, with hotels, night clubs, gambling casinos and restaurants. But these "labor contracts" fix labor standards and wages, not just for the rare or usually non-existent employees of the involved hotels, night clubs, casinos and restaurants, but for leader-employers like plaintiffs and for their sidemen and subleaders *when they perform in such establishments.* The professional orchestra-leader-employer who brings his orchestra to such establishments must, therefore, submit to a labor contract which he never negotiated, and which is imposed upon him by the contracting parties. Also as a result of such "labor contracts" and of union bylaws, he must use a "Form B" contract, by which he is forced to acknowledge that he is *not* an employer; and that his "employer" is the purchaser of the music; *i.e.*, the guest or lessee of the involved hotel, nightclub or restaurant, with whom he signed the engagement contract dictated by the AFM. If the leader-employer refuses to sign, his orchestra will not be permitted by the Union to work. If the hotel, nightclub, casino or restaurant permits such a dissident leader-employer to perform on its premises or itself refuses to sign the Form B contract (on the valid ground that it has no musician employees), the establishment is struck or put on the Unfair List. See in this connection, the decision of the NLRB in *Reno Musicians Protective Union, Local 368 and Foster S. Edwards, et al.*, 170 NLRB No. 56, where all this occurred recently.

(9) This Court (footnote 6, majority opinion) deemed "vital" the distinction between "the kinds of single engagements". It then proceeded to demonstrate how it

was misled as to the vital facts. It stated that "the 'non-club date' engagements are ordinarily governed by collective bargaining agreements . . . the same is usually true of the steady engagement field". The fact is that by far the largest number of "non-club date" engagements is booked by professional orchestra-leader-employers like plaintiffs. The same is true of the vast majority of steady engagements. They are *not* covered by collective agreements; because neither AFM nor any of its locals has ever concluded a labor contract with any leader-*employer*. Thus, the vast majority of "non-club date" engagements and of steady engagements is *never* moderated by collective bargaining because of the manner in which the Union asserts its monopoly power. This is uncontradicted on the record. In a matter of fact regarded as "vital", the majority of this Court was, therefore, misled into gross error.

(10) Another unsound corollary implicit in this Court's ruling on these cases yields to courts and unions the right to probe into questions like: (i) whether the minimum prices fixed by unions for an entire industry include margins above labor costs which are "reasonable"; (ii) whether the *employer* collects (from his customer) "an amount which is "unrelated to his costs in that function"; (iii) whether the *employer* collects from his customer "an amount sufficient to make up the total of his out-of-pocket expenses"; (iv) whether the leader-employer charges an "amount sufficient to compensate him" for personally performing employer functions! Indeed the dissenting opinion seems to apply a prevailing-rate-of-wages concept to union pricing: prices may not be "less than the *going scale* for union musicians and subleaders" (emphasis added). Surely, such inquiry by the courts and such price-fixing by unions was never intended by any Congress in American history. Nor is such probing appropriate for courts or for the economy of our country. These are

economic, political and legislative matters, better left to Congress or to legislation by the States.

(11) If to-day the Court grants "union immunity for regulation of those activities of bandleaders which *sufficiently* affect union members," where will this thrust end its impact upon the American economy? If there is to be equal protection of the laws, unions will demand and receive immunity for regulation of *all* employer activities (including pricing) which, in the opinion of union leaders, "sufficiently affect union members". This is judicial legislation run riot, providing a new and slippery standard for union or judicial appraisal of labor and antitrust conduct.

(12) In footnote No. 8 of the majority opinion appears the following language:

> "The Court of Appeals also found 'no evidence of a conspiracy between Local 802, or the Federation, and orchestra leaders to culminate competitors, fix prices or achieve any other commercial restraint, nor was such a finding made by the district judge. Rather, the record establishes that all restraints were instituted unilaterally by the unions and acquiesced in by the orchestra leaders.' 372 F. 2d, at 164; see 241 F. Supp., at 891."

Petitioners respectfully submit that the evidence of such combination or conspiracy between defendant Unions and many employers (in the "non-labor group") is overwhelming, and uncontradicted in the record; and that the courts below erred grievously in this respect. Nor, in legal principle or in reason, should it matter whether the restraints in question were "instituted unilaterally" or "acquiesced in" by leader-*employers*. In any event, enforcement of the restraints (no matter who *originated* them) was definitely and indisputably in combination with booking

agents, leader-employers, hotels, nightclubs, caterers and many others. If it be true (as the dissent suggests in its footnote No. 9) that this Court did *not* intend "to hold that unilateral demands, enforced by threats, combined with willing cooperation or relevant acquiescence by leaders . . . cannot amount to a combination in restraint of trade", the uncontradicted testimony and documents in this record establish such a combination here beyond reasonable doubt.

Despite the mass of uncontradicted and indisputable evidence in the record, the glaring fact of such combination was neglected below and here; or it was rationalized out of sight: (i) by splitting the combination into components ("instituted unilaterally by the unions" and "acquiesced in by the orchestra leaders") which unmistakably spell out combination; or (ii) by conveniently dubbing full-time orchestra-leader-*employers* and entrepreneurs as members of a "*labor* group", because they were guilty of performing "labor group work" of a type invariably performed by all professional leader-employers. Actually, the plaintiffs did what any and all employers in the music industry regularly and typically do; and acting in that way should not disparage their *employer* status. How an *employer* can belong to a "*labor* group" is not explained, except by partitioning the functions of leader-employers; although no court or board has ever dreamed of such splitting of employer functions in any other industry, where the only and simple inquiry was whether the alleged employer is really such. Applying to leader-employers the tests applicable to employers in other industries, there can be no doubt about plaintiffs status as employers. Even Judge Levet saw this in other cases involving the same plaintiffs: *Cutler* v. *Musicians,* 211 F. Supp. 433; *Carroll* v. *Musicians,* 206 F. Supp. 462.

Legislative developments after the *Lake Valley* case raised serious questions about the vitality of that case, which was certainly limited in *Hinton* v. *Columbia River Packers Association,* 117 Fed. 2d 310, 313 (Ninth Circuit,

1941), reversed 315 U. S. 143, 147 (1942). The Taft Hartley Amendments were obviously intended to limit the situations in which independent contractors could be characterized as employees. Section 2(3) National Labor Relations Act, 61 Stat. 137 (1947), 21 U.S.C. § 152 (3) (1958) amending 49 Stat. 450 (1935); House Committee on Education and Labor, Labor-Management Relations Act, 1947, H. R. Rept. 245, 80th Congress, First Session, 18 (1947); *NLRB* v. *Steinberg,* 182 F. 2d 850 (CA 5, 1950).

Furthermore, § 8 (b) (4) (A), added by 61 Stat. 140 (1947), 29 U.S.C. § 158 (b) (4) (A) (1958), as amended, 29 U.S.C. § 158 (b) (4) (A) clearly reinforces § 2(3) NLRA by proscribing union pressures to force *self-employed persons* to join unions. Congress also forbade "supervisors" from being members of rank-and-file unions. It forbade, *a fortiori, employers* from being members of the same unions which organize their employees. Under these circumstances, there is no statutory warrant for this Court in antitrust cases to expand the "labor group" or to construe the Norris-La Guardia Act as if the NLRA did not exist.

(12) The dissent correctly paraphrases one aspect of this Court's ruling in this case as follows:

> "Unions are, of course, not without interest in the prices at which employers sell. As the majority points out, by seeing that employers sell at prices covering all their costs, a union can insure employer solvency and make more certain employee collection of wages owed them. In addition, assuring that competing employers charge at least a minimum price prevents price competition from exerting downward pressure on wages."

In no other industry has union "interest in the prices at which *employers* sell" been used as justification for

union price-setting. In none have unions been allowed to oversee *employer* prices to "insure employer solvency." Throughout the opinions in this case, the status of plaintiffs as genuine employers has been implicity denied (despite footnote 7 of the majority opinion). A prime example of such implicit denial appears from the quotation just made whose rationale (if applied to all genuine employers in all industries) could effect an economic revolution of country-wide dimensions. To assure that "competing employers charge at least a minimum price" and in order to aid unions in preventing "price competition * * * exerting downward pressure on wages" means to convert the government of the economic sector into a labor government and to attach to our antitrust laws a gloss which contradicts every relevant expression of legislative intent to be found in our labor law and antitrust law. It means that the area of "legitimate union interest in the prices at which employers sell" is left without any confining barrier except what union self-discipline imposes or what the courts come up with, by way of price regulation which no statute authorizes and which both statutes and cases reprobate.

Petitioners, therefore, in the light of the computations of prices made by them daily as leader-employers (computations never, apparently, considered by any court in these cases, although they are implicit in the Union Price-List booklets) are appalled by the fact that this Court's majority was not impeded from its revolutionary ruling here by Justice White's warning:

> "* * * a significant aid to satisfactory resource allocation and a deterrent to inflation, would be substantially diminished if industry-wide unions were free to dictate uniform prices through agreements with employers. I have always thought that this strong policy outweighed the legitimate union interests in the prices at which employers sell, and until today I had thought

> that the Court agreed. Of course the lack of discussion of this question in the majority's opinion, and the failure to refer to the unanimous rejection in *Jewel Tea* of antitrust immunity for union efforts to fix industry-wide prices, suggest that the Court takes this step without full awareness of the implications and the likely consequences. The step is nonetheless disturbing and I must record my dissent."

It is respectfully submitted that there was not only "lack of discussion" but inferential rejection of *Jewel Tea; Allen-Bradley, Los Angeles Meat Driver,* and the *Hinton* cases. This Court and the courts below were misled as to the Union pricing realities by the failure of the Trial Court to note, from the numerous executed Form B contracts introduced into evidence, the actually involved pricing computations. There was a failure to appreciate the potential of both opinions to embrace union pricing in all industries. For the sudden discovery of "labor group work", performed by *employers,* provides a conceptualism elastic enough to englobe all employers in all industries. There are no employers (except corporate entities) who do not at times perform what can be called (very loosely, since the terms are themselves semantically very loose) "employer's labor service" or "labor-group work." Every human *employer* daily does things, as such, which union members can do or do. Only *corporations* like the Stephen Scott Organization and like Charles Peterson Theatrical Productions, Inc., fit into the artificial category of orchestra "leaders who never personally lead", in the following sentence taken from the dissenting opinion:

> "The musicians union imposes its rules not only on petitioners, who sometimes lead and sometimes hire subleaders, but upon leaders who never lead personally. These leaders are merely independent businessmen, performing no 'labor group' work and the union has no proper interest in regulating their activities."

This is like saying: "Unions impose rules on bosses (employers) who sometimes do the bossing and sometimes hire supervisors to do it for them." What right, under statute or under a justifiable labor or antitrust jurisprudence, does the *union* have to make rules for genuine *employers* (plaintiffs) and genuine *supervisors* (subleaders)?

The quotation just made is also like saying that an active orchestra leader cannot be an employer; that a reputed leader cannot lead by hand, by baton or by playing an instrument, without subjecting himself to "legitimate union interest." It is like saying an architect can't be an employer unless he stays away from the drafting board; that a jeweler can't be an employer unless he handles no jewels or customers; that a chemist can't be an employer except when he fingers no test tubes; that a shop-keeper cannot be an employer unless he refuses to deal with customers; that an executive cannot be an employer under the NLRA unless he takes care not to perform an employer function which actually *or potentially* can be discharged by union members, actual *or potential!* Where does it all end? The only real employers, insulated from "legitimate union interest" under the rule in these cases, are legal personalities—*corporations* and retired bosses *who do not work as such.* There never was a more sweeping development under the law of master and servant!

Is nothing whatever to be said in favor of the *right of an employer to work as such?* Must the union juggernaut roll over this right, too—a right which is creative, which provides the initiative in all industry, *and which opens the gateway of opportunity to union members who want to better themselves?*

(13) We can do no better, in dealing with this point in our petition than to refer to the dissent (pp. 8-9, Slip Opinion). We do so with two observations. We realize that it was already considered by the majority—but not in

the context of the corrections of factual errors made in this petition. Moreover, we apply the quotation to plaintiffs and to all professional orchestra leaders, who are *genuine employers,* regardless of the irrelevant and spurious concept of an *employer's* "labor group work", which is allowed to submerge *employer status.*

Justice White mentions only *five* commercial restraints imposed by the union. The record, especially the AFM bylaws, show dozens of them. Indeed, many AFM bylaws exclusively regulate the entrepreneurial activities of orchestra-leader-employers.

(13) The Trial Court not only dismissed the complaint but awarded costs to defendants. This Court affirmed the judgment of the District Court "in its entirety." In a case where defendants committed so many illegalities and where so much is to be said validly for plaintiffs' contentions, the award of costs seems to petitioners to be grossly unfair. Since, under Rule 54 (d) F.R.C.P., the award of costs is discretionary, petitioners respectfully submit that, at the very least, no costs should be allowed against them in this 8-year-old litigation by which they fought against union power and wealth to vindicate their ordinary rights as *employers.* The Second Circuit refused to allow costs; and even Judge Friendly, on dissent, made no mention of costs. See *Arabian American Oil Company* v. *Farmer,* 379 U. S. 227. Plaintiffs have spent their life savings in seeking justice against Unions which derived most of their income from leader-employers like plaintiffs.

(14) The majority of this court agreed with Judges Friendly and Anderson that leaders may be pressured into AFM Unions. Petitioners contend that such pressure is a predatory practice and a violation of the Sherman Act. In the present state of AFM bylaws and practice, no organized sideman or subleader is allowed to perform with or for an orchestra led by a nonunion member. If a leader

wants to work, he is obliged to pay dues and adhere to union regulation. Section 2 (3) of the National Labor Relations Act explicitly excludes independent contractors from the definition of employee; *a fortiori* employers are excluded. Congress has indicated that this provision was intended to bar union membership of independent contractors. (H. R. Report #245, 80 Congress, 1st Session 18 (1947); H. R. Report Rep. #510, 80 Congress, 1st Session 1138.) Section 14(a) provides that nothing in the Act prohibits supervisors from becoming or remaining members of a labor organization which is *different* from the organization which has organized the rank and file workers. The absence from the Act of a similar proviso for independent contractors can be interpreted as a prohibition of union membership for independent contractors under the rule *expressio unius est exclusio alterius.* Section 8 (b) (4) (A) makes it an unfair labor practice to pressure or coerce self-employed persons into a labor union. The NLRB regards a unit of employees and independent contractors inappropriate for collective bargaining and certification. *General Foods Corporation, Birds Eye Division,* 110 NLRB 1088 (1952); *Hampton Roads Broadcasting Corp.,* 98 NLRB 1090 (1952).

(15) The very manner in which the majority framed the question to which it addressed itself fails fairly to state the issues raised by petitioners. Those issues did *not* affect "orchestra leaders" as a generality, but only *petitioners and other professional leader-employers* who constitute a very small, homogeneous, unique and established genre of orchestra leaders. It is perhaps impossible to include within the compass of a single question the numerous comprehensive legal issues involved. But the following is a more accurate *status quaestionis* than the one which seems to have misled this Court: Whether certain specific practices and bylaws of AFM and its locals, which are enforced against plaintiffs, as Union members and as full-time *employers* and businessmen, violate the Sherman

Act as activities in combination with non-labor groups (including other leader-*employers*, who are Union members) or are exempted from the antitrust laws by the Norris La Guardia Act construed in the context of the Sherman Act, the Clayton Act, the NLRA, the Taft-Hartley Act and the Labor-Management Reporting and Disclosure Act?

Section 4(b) of the Norris Laguardia Act forbids injunctions against becoming or remaining a member of a labor organization only in *labor disputes*. There is no labor dispute within the meaning of that Act between petitioners and the AFM, its various locals or their members. The courts have read this section of the Norris Laguardia Act as if it did not cover concerted activities of self-employed workers, to say nothing of concerted activities of employers. *Columbia River Co.* v. *Hinton*, 315 U. S. 143 (1941). The Norris-LaGuardia Act and the Clayton Act, said this case, applied only when an employer-employee relationship was at the "matrix of the controversy" (315 U. S. 143, 147). The matrix of the present controversy is not a "labor dispute" but *price-fixing* by the Unions in combination with non-labor groups. The *Hinton* doctrine has been applied to situations in which independent contractors combined to fix compensation for work and labor, even though no tangible commodity was exchanged. *American Medical Association* v. *United States*, 317 U. S. 519 (1942); *United States* v. *National Association of Real Estate Boards*, 339 U. S. 485 (1950); *Taylor* v. *Local 7, International Brotherhood of Journeymen Horseshoers*, 352 F. 2d 593 (4th Circuit 1965), certiorari denied, 384 U. S. 967 (1965); *Gulf Coast Shrimpers and Oysters Association* v. *United States*, 230 F. 2d 658 (5th Circuit 1956), certiorari denied, 352 U. S. 927, rehearing denied 352 U. S. 1099 (1957).

Justice Stewart, writing for the Court in the *Grease Peddlers'* case held that injunction against future affiliation of grease peddlers with the union was proper. He did not refute the union's contention that peddlers were

economically disadvantaged and could benefit by union affiliation. He did not deny that the union would be a much stronger collective bargaining force if it had organized all workers in the grease trade. The court focused attention on an unrealistic stipulation that there was an utter lack of job and wage competition between the peddlers and the employee grease collectors. Justice Goldberg repeated Justice Stewart's job and wage or economic interrelationships test; but he failed to refute the argument that permitting peddlers to join the union would make the union a stronger collective bargaining force. It would seem therefore that the phrase "economic interrelationship" means nothing more than job and wage competition. Otherwise it is so vague and amorphous as to be either meaningless or altogether too inclusive.

Judge Friendly's argument that Local 802 had the right to fix the *wages* "of orchestra leaders" [Employers do not receive *wages!*] because it has an "interest" to see that they are compensated for undertaking the exacting job of orchestra leader is plainly wrong. Leader-employers gain many anticompetitive advantages from unionization that would not otherwise be available to them. The 10% traveling surcharge and its successor the 10% traveling wage differential (which Local 802 leaders must now charge to purchasers of music) and the various other union rules which insulate the local single engagement and steady engagement market from outside competition accrue to the advantage of Local 802 bandleaders. Under *Hinton* those bandleaders would not be allowed to receive these benefits by combining among themselves. Neither this Court nor Judge Anderson below has explained why leaders-employers should be allowed to receive these benefits through unionization.

Judge Levet's conclusions which this Court reinstated are erroneous even if his major premise (that leaders, unless union-regulated, will adversely affect employment

of union members) is accepted. The foundation for Judge Levet's opinion is his "labor group" test: and the same test is the foundation of this Court's majority opinion. The facts out of which the labor group test originated showed the unsoundness of this Court's and Judge Levet's use thereof. The "labor group" test grew out of the effort of many employers to escape collective bargaining and to avoid the burdens of federal and state employment taxes. Such employers began operating their business with self-employed persons or independent contractors rather than with *employees* because in that way they could obviate expenses imposed by statute. Many working men welcomed this device. The former employee now drove his own truck or operated his own sewing machine. He was his own boss, an alleged independent business man, an entrepreneur. He, nevertheless, performed the same chores as before. But petitioners as leaders and as employer-businessmen function very differently from employee-musicians. Even as orchestra *leaders,* they *led* their ensembles and their employees *followed* their leadership.

In time this Court acknowledged that the distinction between employees and independent contractors was often meaningless. Each group was sometimes threatened with employer exploitation. That exploitation resulted from the fact that the employer did not want collective bargaining and did not want to pay the employment taxes and assume the other responsibilities of employer. In the instant cases, however, it is the *Union* that does not want collective bargaining, for which petitioners have begged for six years. It is the *Union* which wanted to shift the responsibilities of being an employer from the leader-employer to the purchaser of music, the least likely candidate for such responsibilities, as the taxing authorities quickly showed and as this Court itself acknowledged in *Bartels* v. *Birmingham,* 332 U. S. 126. See also *Cutler* v. *United States,* 180 F. 2d 360 (1950).

In *National Labor Relations Board* v. *Hearst Publications Co., Inc.*, 322 U. S. 111 (1944), this Court, while not relaxing the *Hinton* doctrine, broadened the definition of "employee." But in 1947, Congress overruled the *Hearst* case. For unions that meant that the employer was able to drive down the wages of unionized employees, because independent contractors, who were functionally indistinguishable from union-member employees, were willing to do the same work as union member for less money. Section 8(a)(3) NLRA makes it an unfair labor practice for an employer to replace workers with independent contractors, if the purpose of such conversion is to avoid obligations to bargain collectively. See Note, *"Employee bargaining powers under the Norris Laguardia Act; the independent contractor problem"*, 67 Yale Law Journal 98, 102, note 19. This Court reacted to this situation in three cases: *Milk Wagon Drivers Union Local 753* v. *Lake Valley Products, Inc.;* the *Oliver* case and the *Grease Peddlers* case. In all three of these cases the union wanted and had collective bargaining. In the instant cases, it is the Unions which do not want and do not have collective bargaining. They refuse to recognize leaders like petitioners as *employers.* They find it easier to impose wages, hours, working conditions and prices by means of bylaws than by dealing with the involved employers. In the *Milk Wagon Drivers* case, it was impossible to distinguish functionally those vendors who were allegedly independent contractors from the drivers employed by the dairy companies. Thus, the *Milk Wagon Drivers* case was written against the so called "peddler system" by which the employer sought to avoid collective bargaining and other responsibility as employer. In the instant cases, petitioners are the true employers and they simply want to be recognized as such. They have been shouldering all of the responsibilities of employers. According to the very language used by this Court "the vendor system was a scheme or device utilized for the purpose of escaping the payment

of union wages and the assumption of working conditions not commensurate with those imposed on the union standards." (311 U. S. 91, 98-99.) But petitioners here utilized no scheme or device to escape the payment of Union *wages*, which they always paid even though they were unilaterally and therefore unlawfully imposed. Petitioners also complied meticulously with union working conditions, as unilaterally prescribed in Union bylaws. At no time did they undercut any of the involved union standards even though these, too, were unilaterally imposed. There is not a dot of evidence in the record which even tends to suggest that any petitioner at any time undermined union wages, hours or working conditions. The Union briefs and other documents at no time even allege that this was done by any plaintiff below. In any event, the *Milk Wagon Drivers* case is entirely bare of any anticipation of a "labor group" definition or approach to labor relations. Justice Black who wrote the opinion for the Court deemed the so called peddlers *employees;* as did the contracting parties in their labor contracts. Moreover, the precise holding of the case was that picketing even as part of a campaign to organize alleged independent contractors (who were functionally indistinguishable from union-member employees) could not be enjoined. Thus, this Court did not decide whether the peddlers could or could not join the union or be represented by it. In the *Oliver* case the so called independent contractors delivered freight. In the *Grease Peddlers* case they delivered restaurant grease. But in other respects the facts and the union's position closely resembled the *Milk Wagon Drivers* case. The slight differences are not material here. In *Oliver* the issue was whether federal labor law preempted Ohio's Anti-trust statute. In the *Grease Peddlers* case the union did not contend that the peddlers displaced organized employees. Each of the three opinions does however suggest that if *self-employed workers* or so called *independent contractors* compete with union members they are a "labor group." There is noth-

ing in any of the three opinions which suggests that *employers* do or can constitute a "labor group." No statute or congressional report even intimates that Congress wanted employers and businessmen to affiliate with or be represented and regulated by a bona fide labor organization.

What the majority of this court has done here, in effect, is to attribute a different meaning to the word "labor" in the phrase, "labor group", from the meaning of the word "labor" in the phrase "labor dispute". The result is both anomalous and startling. The group that has the power, namely the Union, can easily sell exemption from antitrust laws or part of it to employers, conveniently placed in a "labor group" without the formalities of collective bargaining. That is like selling indulgences exempting people otherwise liable from punishment under the antitrust laws! Obviously if union officials enforced wage increases solely to assist orchestra leaders-employers to gain anticompetitive advantage, there would be violation of the Sherman Act. But such a wage increase could always be hidden under averments that the increase was justified because it benefited *employee* musicians.

(16) It is difficult to understand how a labor union could discharge a duty of fair representation to both employee-musician and employer-leaders artfully thrown into a "labor group". The duty of fair representation must be read from sections 8(b) and 9(a) NLRA, *National Labor Relations Board* v. *Miranda Fuel Louisville and Nashville Railroad Co.*, 323 U. S. 192 (1944). But these provisions apply only to *employees.* The Act specifically states that the word, "employee", does not include *self-employed persons.* Still less does it include employers like petitioners.

IV. No previous application for the relief herein sought has been made.

WHEREFORE, petitioners undersigned respectfully pray for a rehearing herein upon the grounds aforesaid.

New York, N. Y.
June 13, 1968

.....
Ben Cutler

.....
Joseph Carroll

.....
Marty Levitt

.....
Charles Peterson

Verification

City, County and State of New York:

BEN CUTLER, JOSEPH CARROLL, CHARLES PETERSON and MARTY LEVITT, being duly sworn, say:

We are petitioners herein. The foregoing petition is true to our knowledge; and on the advice of our attorney, we believe that the law cited is valid and applicable; and our request for relief is just and meritorious and was not made for the purpose of delay or for any technical or insubstantial reason.

.....
Ben Cutler

.....
Joseph Carroll

.....
Charles Peterson

.....
Marty Levitt

Sworn to before me this
14th day of June, 1968.

ANTHONY J. SHOVELSKI,
Notary Public,
State of New York.
No. 41-3648915.
Qualified in Queens County.
Commission Expires March 30, 1969.